

)	Case No.
SIDNEY NAIMAN and TERRY)	
FABRICANT, individually and on)	<u>CLASS ACTION</u>
behalf of all others similarly situated,)	
Plaintiff,)	COMPLAINT FOR VIOLATIONS
)	OF:
)	
vs.)	1. NEGLIGENT VIOLATIONS
)	OF THE TELEPHONE
)	CONSUMER PROTECTION
ON DECK CAPTIAL, INC., and DOES))	ACT [47 U.S.C. §227(b)]
1 through 10, inclusive, and each of)	2. WILLFUL VIOLATIONS
them,)	OF THE TELEPHONE
)	CONSUMER PROTECTION
)	ACT [47 U.S.C. §227(b)]
Defendant.)	3. NEGLIGENT VIOLATIONS
)	OF THE TELEPHONE
)	CONSUMER PROTECTION
)	ACT [47 U.S.C. §227(c)]
)	4. WILLFUL VIOLATIONS
)	OF THE TELEPHONE
)	CONSUMER PROTECTION
)	ACT [47 U.S.C. §227(c)]

- 1 -

1 Plaintiffs SIDNEY NAIMAN and TERRY FABRICANT (“Plaintiffs”),
2 individually and on behalf of all others similarly situated, allege the following upon
3 information and belief based upon personal knowledge:

4 **NATURE OF THE CASE**

5 1. Plaintiffs bring this action individually and on behalf of all others
6 similarly situated seeking damages and any other available legal or equitable
7 remedies resulting from the illegal actions ON DECK CAPTIAL, INC.,
8 (“Defendant”), in negligently, knowingly, and/or willfully contacting Plaintiffs on
9 Plaintiffs’ cellular telephones in violation of the Telephone Consumer Protection
10 Act, 47 U.S.C. § 227 *et seq.* (“TCPA”) and related regulations, specifically the
11 National Do-Not-Call provisions, thereby invading Plaintiffs’ privacy.

12 **JURISDICTION & VENUE**

13 2. Jurisdiction is proper under 28 U.S.C. § 1332(d)(2) because Plaintiffs,
14 residents of California, seek relief on behalf of a Class, which will result in at least
15 one class member belonging to a different state than that of Defendant, a Delaware
16 company. Plaintiffs also seek up to \$1,500.00 in damages for each call in violation
17 of the TCPA, which, when aggregated among a proposed class in the thousands,
18 exceeds the \$5,000,000.00 threshold for federal court jurisdiction. Therefore, both
19 diversity jurisdiction and the damages threshold under the Class Action Fairness
20 Act of 2005 (“CAFA”) are present, and this Court has jurisdiction.

21 3. Venue is proper in the United States District Court for the Northern
22 District of California pursuant to 28 U.S.C. 1391(b) and because Defendant does
23 business within the State of California and Plaintiffs reside within the County of
24 Contra Costa and Los Angeles.

25 **PARTIES**

26 4. Plaintiff, SIDNEY NAIMAN (“Plaintiff Naiman”), is a natural person
27 residing in Contra Costa, California and is a “person” as defined by 47 U.S.C. §
28 153 (39).

1 5. Plaintiff, TERRY FABRICANT (“Plaintiff Fabricant”), is a natural
2 person residing in Winnetka, California and is a “person” as defined by 47 U.S.C.
3 § 153 (39).

4 6. Defendant, ON DECK CAPITAL, INC. (“Defendant”) is business
5 lending company, and is a “person” as defined by 47 U.S.C. § 153 (39).

6 7. The above named Defendant, and its subsidiaries and agents, are
7 collectively referred to as “Defendants.” The true names and capacities of the
8 Defendants sued herein as DOE DEFENDANTS 1 through 10, inclusive, are
9 currently unknown to Plaintiff, who therefore sues such Defendants by fictitious
10 names. Each of the Defendants designated herein as a DOE is legally responsible
11 for the unlawful acts alleged herein. Plaintiffs will seek leave of Court to amend
12 the Complaint to reflect the true names and capacities of the DOE Defendants when
13 such identities become known.

14 8. Plaintiffs are informed and believe that at all relevant times, each and
15 every Defendant was acting as an agent and/or employee of each of the other
16 Defendants and was acting within the course and scope of said agency and/or
17 employment with the full knowledge and consent of each of the other Defendants.
18 Plaintiffs are informed and believes that each of the acts and/or omissions
19 complained of herein was made known to, and ratified by, each of the other
20 Defendants.

21 **FACTUAL ALLEGATIONS**

22 9. Beginning in or around March 2017, Defendant contacted Plaintiffs
23 on Plaintiffs’ cellular telephone numbers ending in -1083 and -5502, in an attempt
24 to solicit Plaintiffs to purchase Defendant’s services.

25 10. Defendant used an “automatic telephone dialing system” as defined
26 by 47 U.S.C. § 227(a)(1) to place its call to Plaintiffs seeking to solicit its services.

27 11. Defendant contacted or attempted to contact Plaintiffs from telephone
28 numbers (818) 736-4908, (730) 619- 3979 and (925) 373-6785.

1 12. Defendant's calls constituted calls that were not for emergency
2 purposes as defined by 47 U.S.C. § 227(b)(1)(A).

3 13. During all relevant times, Defendant did not possess Plaintiffs' "prior
4 express consent" to receive calls using an automatic telephone dialing system or an
5 artificial or prerecorded voice on their cellular telephone pursuant to 47 U.S.C. §
6 227(b)(1)(A).

7 14. Further, Plaintiffs' cellular telephone numbers ending in -1083 and –
8 5502 were added to the National Do-Not-Call Registry on or about June 4, 2008
9 and July 23, 2003.

10 15. Defendant placed multiple calls soliciting its business to Plaintiffs on
11 their cellular telephones ending in -1083 and -5502 in or around March 2017 and
12 continuing through July 2017..

13 16. Such calls constitute solicitation calls pursuant to 47 C.F.R. §
14 64.1200(c)(2) as they were attempts to promote or sell Defendant's services.

15 17. Plaintiffs received numerous solicitation calls from Defendant within
16 a 12-month period.

17 18. Plaintiffs requested for Defendant to stop calling Plaintiffs during one
18 of the initial calls from Defendant, thus revoking any prior express consent that had
19 existed and terminating any established business relationship that had existed, as
20 defined under 16 C.F.R. 310.4(b)(1)(iii)(B).

21 19. Despite this, Defendant continued to call Plaintiffs in an attempt to
22 solicit its services and in violation of the National Do-Not-Call provisions of the
23 TCPA.

24 20. Upon information and belief, and based on Plaintiffs' experiences of
25 being called by Defendant after requesting they stop calling, and at all relevant
26 times, Defendant failed to establish and implement reasonable practices and
27 procedures to effectively prevent telephone solicitations in violation of the
28 regulations prescribed under 47 U.S.C. § 227(c)(5).

CLASS ALLEGATIONS

21. Plaintiffs bring this action individually and on behalf of all others similarly situated, as a member the four proposed classes (hereafter, jointly, “The Classes”). The class concerning the ATDS claim for no prior express consent (hereafter “The ATDS Class”) is defined as follows:

All persons within the United States who received any solicitation/telemarketing telephone calls from Defendant to said person’s cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had not previously consented to receiving such calls within the four years prior to the filing of this Complaint

22. The class concerning the ATDS claim for revocation of consent, to the extent prior consent existed (hereafter “The ATDS Revocation Class”) is defined as follows:

All persons within the United States who received any solicitation/telemarketing telephone calls from Defendant to said person’s cellular telephone made through the use of any automatic telephone dialing system or an artificial or prerecorded voice and such person had revoked any prior express consent to receive such calls prior to the calls within the four years prior to the filing of this Complaint.

23. The class concerning the National Do-Not-Call violation (hereafter “The DNC Class”) is defined as follows:

All persons within the United States registered on the National Do-Not-Call Registry for at least 30 days, who had not granted Defendant prior express consent nor had a prior established business relationship, who received

1 more than one call made by or on behalf of Defendant
2 that promoted Defendant's products or services, within
3 any twelve-month period, within four years prior to the
4 filing of the complaint.

5 24. The class concerning the National Do-Not-Call violation following
6 revocation of consent and prior business relationship, to the extent they existed
(hereafter "The DNC Revocation Class") is defined as follows:

7 All persons within the United States registered on the
8 National Do-Not-Call Registry for at least 30 days, who
9 received more than one call made by or on behalf of
10 Defendant that promoted Defendant's products or
11 services, after having revoked consent and any prior
12 established business relationship, within any twelve-
13 month period, within four years prior to the filing of the
14 complaint.

15 25. Plaintiffs represent, and are members of, The ATDS Class, consisting
16 of all persons within the United States who received any solicitation telephone calls
17 from Defendant to said person's cellular telephone made through the use of any
18 automatic telephone dialing system or an artificial or prerecorded voice and such
19 person had not previously not provided their cellular telephone number to
Defendant within the four years prior to the filing of this Complaint.

20 26. Plaintiffs represent, and are members of, The ATDS Revocation
21 Class, consisting of all persons within the United States who received any
22 solicitation/telemarketing telephone calls from Defendant to said person's cellular
23 telephone made through the use of any automatic telephone dialing system or an
24 artificial or prerecorded voice and such person had revoked any prior express
25 consent to receive such calls prior to the calls within the four years prior to the
26 filing of this Complaint.

27 27. Plaintiffs represent, and are members of, The DNC Class, consisting
28 of all persons within the United States registered on the National Do-Not-Call

1 Registry for at least 30 days, who had not granted Defendant prior express consent
2 nor had a prior established business relationship, who received more than one call
3 made by or on behalf of Defendant that promoted Defendant's products or services,
4 within any twelve-month period, within four years prior to the filing of the
5 complaint.

6 28. Plaintiffs represent, and are members of, The DNC Revocation Class,
7 consisting of all persons within the United States registered on the National Do-
8 Not-Call Registry for at least 30 days, who received more than one call made by or
9 on behalf of Defendant that promoted Defendant's products or services, after
10 having revoked consent and any prior established business relationship, within any
11 twelve-month period, within four years prior to the filing of the complaint.

12 29. Defendant, its employees and agents are excluded from The Classes.
13 Plaintiffs do not know the number of members in The Classes, but believes the
14 Classes members number in the thousands, if not more. Thus, this matter should
15 be certified as a Class Action to assist in the expeditious litigation of the matter.

16 30. The Classes are so numerous that the individual joinder of all of its
17 members is impractical. While the exact number and identities of The Classes
18 members are unknown to Plaintiffs at this time and can only be ascertained through
19 appropriate discovery, Plaintiffs are informed and believe and thereon allege that
20 The Classes includes thousands of members. Plaintiffs allege that The Classes
21 members may be ascertained by the records maintained by Defendant.

22 31. Plaintiffs and members of The ATDS Class and The ATDS
23 Revocation Class were harmed by the acts of Defendant in at least the following
24 ways: Defendant illegally contacted Plaintiffs and ATDS Class members via their
25 cellular telephones thereby causing Plaintiffs and ATDS Class and ATDS
26 Revocation Class members to incur certain charges or reduced telephone time for
27 which Plaintiffs and ATDS Class and ATDS Revocation Class members had
28 previously paid by having to retrieve or administer messages left by Defendant

1 during those illegal calls, and invading the privacy of said Plaintiffs and ATDS
2 Class and ATDS Revocation Class members.

3 32. Common questions of fact and law exist as to all members of The
4 ATDS Class which predominate over any questions affecting only individual
5 members of The ATDS Class. These common legal and factual questions, which
6 do not vary between ATDS Class members, and which may be determined without
7 reference to the individual circumstances of any ATDS Class members, include,
8 but are not limited to, the following:

- 9 a. Whether, within the four years prior to the filing of this
10 Complaint, Defendant made any telemarketing/solicitation call
11 (other than a call made for emergency purposes or made with
12 the prior express consent of the called party) to a ATDS Class
13 member using any automatic telephone dialing system or any
14 artificial or prerecorded voice to any telephone number
15 assigned to a cellular telephone service;
- 16 b. Whether Plaintiffs and the ATDS Class members were
17 damaged thereby, and the extent of damages for such violation;
18 and
- 19 c. Whether Defendant should be enjoined from engaging in such
20 conduct in the future.

21 33. As a person that received numerous telemarketing/solicitation calls
22 from Defendant using an automatic telephone dialing system or an artificial or
23 prerecorded voice, without Plaintiffs' prior express consent, Plaintiffs are asserting
24 claims that are typical of The ATDS Class.

25 34. Common questions of fact and law exist as to all members of The
26 ATDS Revocation Class which predominate over any questions affecting only
27 individual members of The ATDS Revocation Class. These common legal and
28 factual questions, which do not vary between ATDS Revocation Class members,

1 and which may be determined without reference to the individual circumstances of
2 any ATDS Revocation Class members, include, but are not limited to, the
3 following:

- 4 a. Whether, within the four years prior to the filing of this
5 Complaint, Defendant made any telemarketing/solicitation call
6 (other than a call made for emergency purposes or made with
7 the prior express consent of the called party) to an ATDS
8 Revocation Class member, who had revoked any prior express
9 consent to be called using an ATDS, using any automatic
10 telephone dialing system or any artificial or prerecorded voice
11 to any telephone number assigned to a cellular telephone
12 service;
- 13 b. Whether Plaintiffs and the ATDS Revocation Class members
14 were damaged thereby, and the extent of damages for such
15 violation; and
- 16 c. Whether Defendant should be enjoined from engaging in such
17 conduct in the future.

18 35. As a person that received numerous telemarketing/solicitation calls
19 from Defendant using an automatic telephone dialing system or an artificial or
20 prerecorded voice, after Plaintiffs have revoked any prior express consent,
21 Plaintiffs are asserting claims that are typical of The ATDS Revocation Class.

22 36. Plaintiffs and members of The DNC Class and DNC Revocation Class
23 were harmed by the acts of Defendant in at least the following ways: Defendant
24 illegally contacted Plaintiffs and DNC Class and DNC Revocation Class members
25 via their telephones for solicitation purposes, thereby invading the privacy of said
26 Plaintiffs and the DNC Class and DNC Revocation Class members whose
27 telephone numbers were on the National Do-Not-Call Registry. Plaintiffs and the
28 DNC Class and DNC Revocation Class members were damaged thereby.

1 37. Common questions of fact and law exist as to all members of The
2 DNC Class which predominate over any questions affecting only individual
3 members of The DNC Class. These common legal and factual questions, which do
4 not vary between DNC Class members, and which may be determined without
5 reference to the individual circumstances of any DNC Class members, include, but
6 are not limited to, the following:

- 7 a. Whether, within the four years prior to the filing of this
8 Complaint, Defendant or its agents placed more than one
9 solicitation call to the members of the DNC Class whose
10 telephone numbers were on the National Do-Not-Call Registry
11 and who had not granted prior express consent to Defendant and
12 did not have an established business relationship with
13 Defendant;
- 14 b. Whether Defendant obtained prior express written consent to
15 place solicitation calls to Plaintiffs or the DNC Class members'
16 telephones;
- 17 c. Whether Plaintiffs and the DNC Class member were damaged
18 thereby, and the extent of damages for such violation; and
- 19 d. Whether Defendant and its agents should be enjoined from
20 engaging in such conduct in the future.

21 38. As a person that received numerous solicitation calls from Defendant
22 within a 12-month period, who had not granted Defendant prior express consent
23 and did not have an established business relationship with Defendant, Plaintiffs are
24 asserting claims that are typical of the DNC Class.

25 39. Common questions of fact and law exist as to all members of The
26 DNC Class which predominate over any questions affecting only individual
27 members of The DNC Revocation Class. These common legal and factual
28 questions, which do not vary between DNC Revocation Class members, and which

1 may be determined without reference to the individual circumstances of any DNC
2 Revocation Class members, include, but are not limited to, the following:

- 3 a. Whether, within the four years prior to the filing of this
4 Complaint, Defendant or its agents placed more than one
5 solicitation call to the members of the DNC Class whose
6 telephone numbers were on the National Do-Not-Call Registry
7 and who had revoked any prior express consent and any
8 established business relationship with Defendant;
- 9 b. Whether Plaintiffs and the DNC Class member were damaged
10 thereby, and the extent of damages for such violation; and
- 11 c. Whether Defendant and its agents should be enjoined from
12 engaging in such conduct in the future.

13 40. As a person that received numerous solicitation calls from Defendant
14 within a 12-month period, who, to the extent one existed, had revoked any prior
15 express consent and any established business relationship with Defendant,
16 Plaintiffs are asserting claims that are typical of the DNC Revocation Class.

17 41. Plaintiffs will fairly and adequately protect the interests of the
18 members of The Classes. Plaintiffs have retained attorneys experienced in the
19 prosecution of class actions.

20 42. A class action is superior to other available methods of fair and
21 efficient adjudication of this controversy, since individual litigation of the claims
22 of all Classes members is impracticable. Even if every Classes member could
23 afford individual litigation, the court system could not. It would be unduly
24 burdensome to the courts in which individual litigation of numerous issues would
25 proceed. Individualized litigation would also present the potential for varying,
26 inconsistent, or contradictory judgments and would magnify the delay and expense
27 to all parties and to the court system resulting from multiple trials of the same
28 complex factual issues. By contrast, the conduct of this action as a class action

1 presents fewer management difficulties, conserves the resources of the parties and
2 of the court system, and protects the rights of each Classes member.

3 43. The prosecution of separate actions by individual Classes members
4 would create a risk of adjudications with respect to them that would, as a practical
5 matter, be dispositive of the interests of the other Classes members not parties to
6 such adjudications or that would substantially impair or impede the ability of such
7 non-party Class members to protect their interests.

8 44. Defendant has acted or refused to act in respects generally applicable
9 to The Classes, thereby making appropriate final and injunctive relief with regard
10 to the members of the Classes as a whole.

11 **FIRST CAUSE OF ACTION**

12 **Negligent Violations of the Telephone Consumer Protection Act**

13 **47 U.S.C. §227(b).**

14 **On Behalf of the ATDS Class and ATDS Revocation Class**

15 45. Plaintiffs repeat and incorporate by reference into this cause of action
16 the allegations set forth above at Paragraphs 1-44.

17 46. The foregoing acts and omissions of Defendant constitute numerous
18 and multiple negligent violations of the TCPA, including but not limited to each
19 and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular
20 *47 U.S.C. § 227 (b)(1)(A)*.

21 47. As a result of Defendant's negligent violations of *47 U.S.C. § 227(b)*,
22 Plaintiffs and the Class Members are entitled an award of \$500.00 in statutory
23 damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)*.

24 48. Plaintiffs and the ATDS Class and ATDS Revocation Class members
25 are also entitled to and seek injunctive relief prohibiting such conduct in the future.

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SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

On Behalf of the ATDS Class and the ATDS Revocation Class

49. Plaintiffs repeat and incorporate by reference into this cause of action the allegations set forth above at Paragraphs 1-44.

50. The foregoing acts and omissions of Defendant constitute numerous and multiple knowing and/or willful violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(b)*, and in particular *47 U.S.C. § 227 (b)(1)(A)*.

51. As a result of Defendant's knowing and/or willful violations of *47 U.S.C. § 227(b)*, Plaintiffs and the ATDS Class and ATDS Revocation Class members are entitled an award of \$1,500.00 in statutory damages, for each and every violation, pursuant to *47 U.S.C. § 227(b)(3)(B)* and *47 U.S.C. § 227(b)(3)(C)*.

52. Plaintiffs and the Class members are also entitled to and seek injunctive relief prohibiting such conduct in the future.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

On Behalf of the DNC Class and the DNC Revocation Class

53. Plaintiffs repeat and incorporate by reference into this cause of action the allegations set forth above at Paragraphs 1-44.

54. The foregoing acts and omissions of Defendant constitute numerous and multiple negligent violations of the TCPA, including but not limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*, and in particular *47 U.S.C. § 227 (c)(5)*.

55. As a result of Defendant's negligent violations of *47 U.S.C. § 227(c)*,

1 Plaintiffs and the DNC Class and DNC Revocation Class Members are entitled an
2 award of \$500.00 in statutory damages, for each and every violation, pursuant to
3 *47 U.S.C. § 227(c)(5)(B)*.

4 56. Plaintiffs and the DNC Class and DNC Revocation Class members are
5 also entitled to and seek injunctive relief prohibiting such conduct in the future.

6 **FOURTH CAUSE OF ACTION**

7 **Knowing and/or Willful Violations of the Telephone Consumer Protection**
8 **Act**

9 **47 U.S.C. §227 et seq.**

10 **On Behalf of the DNC Class and DNC Revocation Class**

11 57. Plaintiffs repeat and incorporate by reference into this cause of action
12 the allegations set forth above at Paragraphs 1-44.

13 58. The foregoing acts and omissions of Defendant constitute numerous
14 and multiple knowing and/or willful violations of the TCPA, including but not
15 limited to each and every one of the above cited provisions of *47 U.S.C. § 227(c)*,
16 in particular *47 U.S.C. § 227 (c)(5)*.

17 59. As a result of Defendant's knowing and/or willful violations of *47*
18 *U.S.C. § 227(c)*, Plaintiffs and the DNC Class and DNC Revocation Class
19 members are entitled an award of \$1,500.00 in statutory damages, for each and
20 every violation, pursuant to *47 U.S.C. § 227(c)(5)*.

21 60. Plaintiffs and the DNC Class and DNC Revocation Class members are
22 also entitled to and seek injunctive relief prohibiting such conduct in the future.

23 **PRAYER FOR RELIEF**

24 WHEREFORE, Plaintiffs request judgment against Defendant for the following:

25 **FIRST CAUSE OF ACTION**

26 **Negligent Violations of the Telephone Consumer Protection Act**

27 **47 U.S.C. §227(b)**

- 28
 - As a result of Defendant's negligent violations of *47 U.S.C.*

§227(b)(1), Plaintiffs and the ATDS Class and ATDS Revocation Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(b)(3)(B).

- Any and all other relief that the Court deems just and proper.

SECOND CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(b)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(b)(1), Plaintiffs and the ATDS Class and ATDS Revocation Class members are entitled to and request treble damages, as provided by statute, up to \$1,500, for each and every violation, pursuant to 47 U.S.C. §227(b)(3)(B) and 47 U.S.C. §227(b)(3)(C).
- Any and all other relief that the Court deems just and proper.

THIRD CAUSE OF ACTION

Negligent Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's negligent violations of 47 U.S.C. §227(c)(5), Plaintiffs and the DNC Class and DNC Revocation Class members are entitled to and request \$500 in statutory damages, for each and every violation, pursuant to 47 U.S.C. 227(c)(5).
- Any and all other relief that the Court deems just and proper.

FOURTH CAUSE OF ACTION

Knowing and/or Willful Violations of the Telephone Consumer Protection Act

47 U.S.C. §227(c)

- As a result of Defendant's willful and/or knowing violations of 47 U.S.C. §227(c)(5), Plaintiffs and the DNC Class and DNC

1 Revocation Class members are entitled to and request treble damages,
2 as provided by statute, up to \$1,500, for each and every violation,
3 pursuant to 47 U.S.C. §227(c)(5).

- 4 • Any and all other relief that the Court deems just and proper.

5 61. Pursuant to the Seventh Amendment to the Constitution of the United
6 States of America, Plaintiffs are entitled to, and demand, a trial by jury.

7
8 Respectfully Submitted this 31st Day of October, 2018.

9 LAW OFFICES OF TODD M. FRIEDMAN, P.C.

10
11 By: /s/ Todd M. Friedman
12 Todd M. Friedman
13 Law Offices of Todd M. Friedman
14 Attorney for Plaintiff
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